IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1824

FLEMING S. JACKSON,
Petitioner,

vs.

STONE AND SIMONS ADVERTISING, INC., et al.,
Respondents.

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The district court (1) entered several opinion and order and (2) rendered oral opinions from the bench. Such (1) opinion and order and (2) oral opinions have not and will not be published and appear herein as follows:

1. Opinion and Order Granting Defendants Motions for Summary Judgment in Part entered April 12, 1974 in Civil Action Nos. 39071, 39072, 39073, 39074 and 74-70900. It appears as Appendix B p. 2.

2. Opinion and Order Hearing of April 15, 1974 entered April 18, 1975 in Civil Action Nos. 39071, 39072, 39073, 39074 and 74-70900. It appears as Appendix C p. 6.

3. Opinion and Order Denying Plaintiff's Motion for Order to Set Aside and Vacate Order Denying Plaintiff's Motion to Amend Complaints entered August 29, 1975 in Civil Action Nos. 39071, 39072, 39073, and 39074. It appears as Appendix D p. 8.

4. Opinion and Order Granting Defendants' Motion and Denying Plaintiff's Motion for Summary Judgment entered August 29, 1975 in Civil Action Nos. 39071, 39072, 39073 and 39074. It appears as Appendix E p. 9.

5. Opinion and Order Granting Attorney's Fees and Costs to Defendants entered August 29, 1975 in Civil Action Nos. 39071, 39072, 39073, 39074 and 74-70900. It appears as Appendix F p. 13.

6. Opinion and Order Denying Plaintiff's Motion to Amend the Complaints entered August 29, 1975 in Civil Action Nos. 39071, 39072, 39073, 39074 and 74-70900. It appears as Appendix G p. 14.

7. Opinion and Order Granting Defendants' Stone & Simon's & Meyer Jewelry's Motion for Summary Judgment entered August 29, 1975 in Civil Action No. 74-70900. It appears as Appendix H p. 15.

8. Opinion and Order Granting Defendants' Motion for Summary Judgment entered September 26, 1975 in Civil Action No. 74-70900. It appears as Appendix I p. 17.

9. Opinion and Order Setting Attorney's Fees and Costs entered October 16, 1975 in Civil Action No. 74-70900. It appears as Appendix J p. 19.

10. Oral opinion of the district court. It appears herein as, Excerpts of Proceedings had before the Honorable Cornelia G. Kennedy, United States District Judge, on Monday, November

19, 1973 in Civil Action Nos. 39071, 39072, 39073, and 39074; [Tr. 22, 23, 24] Appendix K p. 21.

11. Oral Opinion of the district court. It appears herein as, Excerpts of Proceedings had before the Honorable Cornelia G. Kennedy, United States District Judge, on Monday, April 15, 1974 in Civil Action Nos. 39071, 39072, 39073, and 39074; [Tr. pp. 31, 32, 41-44], Appendix L p. 22.

12. Oral opinion of the district court. It appears herein as, Excerpts of Proceedings had before the Honorable Cornelia G. Kennedy, United States District Judge, on Monday, January 28, 1974 in removed Civil Action No. 74-70900; Tr. pp. 22, 23, Appendix M p. 25.

13. Oral opinion of the district court. It appears herein as, Excerpts of Proceedings had before the Honorable Cornelia G. Kennedy, United States District Judge, on Monday, February 25, 1974 in removed Civil Action No. 74-70900; [Tr. pp. 2, 3, 4], transcription dated March 18, 1974, Appendix N p. 26.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is a civil action "at law", incontradistinction to "equity", for damages only. This action arises under the United States Copyright Laws, 17 USC § 101 thereof. Federal District Court has original jurisdiction of such action pursuant to 28 USC § 1338(a).

(ii) This appeal is an appeal from "Order Denying Plaintiff's Motion to Reverse and/or Set Aside and/or Vacate Void Judgments" entered in Civil Action Nos. 39071, 39072, 39073, 39074 and removed Civil Action No. 74-70900 on the 31st day of August, 1976, by the United States District Court, Eastern District of Michigan, Southern Division, through the Honorable

Cornelia G. Kennedy, at which time the Court made a "redetermination of the merits". Said order is final and appealable. Said Order was appealed from to the United States Court of Appeals for the Sixth Circuit at which time Notice of Appeal was filed September 24, 1976 in the United States District Court, Eastern District of Michigan, Southern Division. Such Notice of Appeal appears as Appendix O p. 29.

Appellant's Petition for Rehearing filed March 16, 1977 by Plaintiff-Appellant, Fleming S. Jackson, was denied in an Order filed March 28, 1977. Said order appears as Appendix XII p. 138.

Notice of Appeal to the Supreme Court of the United States was filed April 25, 1977 in the United States District Court, Eastern District of Michigan, Southern Division. Such Notice of Appeal appears as Appendix Q p. 33.

JURISDICTION

(iii) Jurisdiction of the appeal is conferred on this Court by 28 USC §§ 1252, 2101.

(iv) Cases believed to sustain the jurisdiction of this court are as follows:

Fleming v. Rhodes (1947), 331 US 100, 69 S Ct 1140, 91 L Ed 1368;

International Ladies Garment Workers' Union v. Donnelly Garment Co. (1938), 304 US 243, 58 S. Ct 875, 82 L Ed 1316;

United States v. Raines (1960), 362 US 17, 80 S. Ct. 519, 4 L Ed 2d 254.

STATUTES INVOLVED

(v) As applied to particular facts, by the district court, the validity of federal statutes 17 USC §§ 1 et seq.; 2; 3; 4; 7; 11; 27; 30; 101; 115; 116; 209; and 28 USC §§ 1331; 1332; 1338(a); 1359; 1441; 2072 are herein involved.

[1]The full text of said statutes, are as follows:

28 USC § 1331

Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415 [28 USCA § 1331 p. 260]

28 USC § 1332

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or

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[1] Title 17 USC §§ 1 et seq.; 2; 3; 4; 7; 11; 27; 30; 101; 115; 116; and 209 are set forth herein as Appendix VII.

value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, v. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445. [28 USCA § 1332 p. 2]

28 USC § 1338

Patents, plant variety protection, copyrights, trademarks and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws.

June 25, 1948, c. 646, 62 Stat. 931; Dec. 24, 1970, Pub.L. 91-577, Title III, § 143(b), 84 Stat. 1559.

[28 USCA § 1338 pp. 162, 163]

28 USC § 1359

Parties collusively joined or made

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

June 25, 1948, c. 646, 62 Stat. 935.

[28 USCA § 1359 p. 448]

28 USC § 1400

Patents and Copyrights

(a) Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights may be instituted in the district in which the defendant or his agent resides or may be found.

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

June 25, 1948, c. 646, 62 Stat. 936.

[28 USCA § 1400 p. 186]

28 USC § 1441

Actions Removable Generally

(a) Except as otherwise expressly provided by act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined

with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. June 25, 1948, c. 646, 62 Stat. 937.

[28 USCA § 1441 p. 5]

28 USC § 2072

Rules of Civil Procedure for District Courts

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 103, 63 Stat. 104; July 18, 1949, c. 343, § 2, 63 Stat. 446; May 10, 1950, c. 174, § 2, 64 Stat. 158; July 7, 1958, Pub.L. 85-508, § 12(m), 72 Stat. 348.

[28 USCA § 2072 pp. 76, 77]

28 § 2403

Intervention by United States; Constitutional Question

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality. June 25, 1948, c. 646, 62 Stat. 971.

28 § 1252

Direct Appeals

Direct Appeals From Decisions Invalidating Acts of Congress

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court. June 25, 1948, c. 646, 62 Stat. 928; Oct. 31, 1951, c. 655, § 47, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), (f), 72 Stat. 348; Mar. 18, 1959, Pub.L. 86-3, § 14 (a), 73 Stat. 10.

§ 2101. Supreme Court; Time for Appeal or Certiorari; Docketing; Stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104.

QUESTIONS PRESENTED BY THE APPEAL

Civil Action Nos. 39071, 39072, 39073, 39074

I. In a non-diverse civil action in a district court upon claims of alleged statutory infringement of copyright of a character formerly cognizable at law in which the defendants, by and through their counsel of records, (1) *admit, in a Stipulation of Uncontested Facts, the claims of alleged infringement of copyright set forth in the Complaints of such action;* and (2) have been granted (i) Motions for Summary Judgment and Award of Attorney's Fees (ii) Judgment for Attorney's Fees and Costs and (iii) Judgment Dismissing Action, based on a claim of a character formerly cognizable in equity;

(a) if such equitable claim is based on an agreement brought forth by such defendants, as a defense against alleged infringement of copyright; and

(b) if such agreement is not an integrated part of such non-diverse civil action; and

(c) *if such defendants are not (1) parties to such agreement and (2) donee or creditor beneficiaries of such agreement:*

A. Beneficiaries of Agreement

(1). are such defendants beneficiaries of such agreement?

(2). do such defendants have the right to enforce such agreement against the promisor of such agreement?

B. Infringement of Copyright

(1). is infringement of copyright established in such non-diverse civil action if the defendants of such action admit copying, for profit, a copyrighted work without license or consent of owner and proprietor of copyright to such work?

(2). *is such agreement a complete bar against alleged statutory infringement of copyright?*

C. Void Judgment and Order

(1). *is an order and/or judgment based on such agreement void?*

D. Final Judgment

(1). is a judgment based on such agreement final?

E. Process & Diversity Jurisdiction

(a) if the terms of such agreement states that "All disputes of any kind, nature or description whatsoever arising in connection with the terms and conditions of "such agreement or arising out of the performance thereof, or based upon alleged breach

thereof, shall be submitted to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association"; and (ii)

(b) if the promisee of such agreement has not had service of process; and (iii)

(c) if such promisee is a foreign corporation;

(1) *does a federal district court sitting in a State other than such State upon whose laws such agreement is based have original jurisdiction of such agreement?*

(2) does a federal district court, which has original jurisdiction of such non-diverse civil action, have diversity jurisdiction of such (1) promisee; and (2) agreement?

F. Due Process Motion Timely

(a) if it appears from the record of such non-diverse civil action that the district court has entered judgments that are absolutely void; and if "Plaintiff's Motion to Reverse and/or Set Aside and/or Vacate Void Judgments" is filed more than (20) days after such judgments have been entered:

(1) is such motion timely?

(2) is an order denying such motion an order that:

(i) regulates procedure or does such order "abridge, modify or enlarge substantive rights"?

(ii) denies due process to plaintiff and defendants and is therefore void?

(iii) is an injunction against the claims "at law" set forth in the Complaints of such civil action?

(iv) *denies plaintiff and defendants a constitutional right of a jury trial, of the claims "at law" set forth in the Complaints*

of such civil action, as declared by the 7th Amendment of the Constitution of the United States of America?

(v) repudiates the court's jurisdiction of the claims "at law" set forth in the Complaints of such action?

Removed Civil Action No. 74-70900.

II. In a removed civil action in a federal district court a claim of alleged "unfair competition" of a character formerly cognizable at law in a State court, of which such State court has original jurisdiction, which was removed to a federal district court upon petition for removal filed by Defendants in which Defendants alleged that original jurisdiction of such claim resides in the federal district court, pursuant to 28 USCA, Section 1338(a) and that such action is identical in law and facts to four-co-pending civil actions of alleged statutory infringement of copyright in such federal district court between the same parties in which (a) Defendants filed a Motion for Summary Judgment based on the pleadings, Brief, oral argument, and the Court's ruling in such four co-pending civil actions of alleged infringement of copyright, between such same parties, in such federal district court; (b) such action has not been consolidated with such four co-pending civil actions of alleged infringement of copyright; (c) a jury demand was filed with the Complaint in such removed action; (d) no pretrial conference was held in such removed action; (e) no proceedings were held in a State court in such removed action; (f) the defendants, by and through their counsel of record, admit, in a Stipulation of Uncontested Facts, the claims of alleged statutory infringement of copyright set forth in the Complaints of such four co-pending civil actions; and (2) have been granted (i) Motions for Summary Judgment (ii) Judgment for Attorney's Fees (iii) Judgment for Attorney's Fees and Costs and (iv) Judgment Dismissing Action based on a claim of a character formerly cognizable in equity.

(b) if such agreement is not an integrated part of such non-diverse civil action; and

(c) if such defendants are not (1) parties to such agreement and (2) donee or creditor beneficiaries of such agreement:

(i) Plaintiff-Appellant, Fleming S. Jackson, pro se, includes by reference, as though fully set forth herein, with full force and efficacy, the questions in Section I, Sub-Sections A, B, C, D, E and F, supra.

G. Motion for Remand

(a) if it appears from the record of such removed action that such action has been improperly removed from a State court, due federal district court's lack of jurisdiction of such removed action; and

(b) if the plaintiff in such removed action files a Motion for Remand;

(1) is an order denying such motion an order that:

(i) Plaintiff-Appellant, Fleming S. Jackson, pro se, includes by reference, as though fully set forth herein, with full force and efficacy, the questions in Section I, Sub-Section F 2 et seq., supra.

Civil Action Nos. 39071, 39072, 39073, 39074 and Removed Civil Action No. 74-70900

III. If a rule of procedure, in its prescription by a court, operates to "abridge, modify or enlarge substantive rights," is such prescription of such rule "within the statutory grant of power embodied in the Act of June 19, 1934"?

Civil Action Nos. 39071, 39072, 39073, 39074 and Removed Civil Action No. 74-70900

IV. *Can "a court, by rule, extend or restrict the jurisdiction conferred by a statute"?*

STATEMENT OF THE CASE

(1) This is an appeal from a final order of the United States District Court for the Eastern District of Michigan Southern Division, denying Plaintiff's Motion to Reverse and/or Set Aside and/or Vacate Void Judgments. Said motion was filed pursuant to Rule 60 (b) FRCP.

(2) This is an action of alleged infringement of copyright to Plaintiff-Appellant's (hereinafter Plaintiff) work entitled "Merry Christmas To You" of which federal district court has original jurisdiction pursuant to 28 USC 1338(a). This action arises under 17 USC §101.

(3) Such alleged infringement of copyright resulted from the broadcast of a commercial of defendant Meyer Jewelry Company by defendant TV stations.

(4) Said commercial of defendant Meyer Jewelry Company was broadcast by the defendant TV stations from video tape; said commercial including a video portion and background music;

(5) The above referenced commercial of defendant Meyer Jewelry Company was produced by defendant Stone & Simons Advertising, Inc.; and

(6) The video tape of the above referenced commercial of defendant Mayer Jewelry Company was produced at WKBD TV for defendants Stone & Simons Advertising, Inc.;

(7) Said commercial was produced, reproduced and broadcast on video tape, including a video representation and a recorded audio portion; The audio portion of said commercial included an announced advertising the products of Defendant Meyer Jewelry Company;

(8) The background music in the said commercial is a recorded portion of Plaintiff's copyrighted production of said copyrighted musical composition;

(9) The words spoken by the announcer in said commercial are in the public domain;

(10) The background music employed in said commercial is protected by Plaintiff's copyright to said musical composition;

(11) Plaintiff is owner and proprietor of copyright to said musical composition; and

(12) A portion of said copyrighted production of said copyrighted musical composition was employed in said commercial by the Defendants-Appellees. (hereinafter Defendants)

(13) *In a Stipulation of Uncontested Facts between Plaintiff and the Defendants' counsel of Record, signed in the presence of the Court and presented to the Court, during a final pre-trial conference held June 9, 1975, the Defendants admitted that a portion of Plaintiff's production of said work was copied, produced, and broadcast, as background music, in the accused commercial.* Said stipulation states that others acted in concert with the Defendants in the production and broadcast of the accused commercial. The Defendants produced without objection or reservation several documents (App. BB p 74) (App. HH p. 86) of this lawsuit. *The Defendants' counsel of record stated during a hearing held November 19, 1973, that the only evidence against alleged infringement that the Defendants could produce is an agreement between Plaintiff and Broadcast Music Incorporated.* (hereinafter BMI).

(14) The Court (1) granted the Defendants summary judgment (2) entered judgments dismissing the actions and (3) awarded the Defendants attorney's fees and costs. The Court bottomed its decision on said agreement between Plaintiff and BMI.

(15) Said agreement grants to BMI the exclusive right to perform "and to license others to perform" Plaintiff's said copyrighted work, as a musical composition.

(16) *Said agreement (i) is not an integrated part of this lawsuit and (ii) was brought forth by the Defendants in a motion for summary judgment.* The Defendants alleged in such motion that, based on said agreement between Plaintiff and BMI, "Plaintiff has no standing to sue" for alleged infringement of copyright to said work. *The Court ruled that said agreement between Plaintiff and BMI is a "complete bar" against infringement of copyright to said work.* (App. KK p. 91)

(17) None of the Defendants are parties to said agreement. Plaintiff, Fleming S. Jackson, is the promisor and BMI is the promisee to said agreement. However, the Court ruled that the Defendants are parties to said agreement "indirectly" and "beneficiaries of it."

(18) *All of the parties to this action are citizens of the State of Michigan. BMI is (1) not a party to this lawsuit* and (2) a foreign corporation whose headquarters now is, and since the commencement of this lawsuit, has been, located in the City and State of New York. *BMI (i) is not a citizen of Michigan.* (ii) *does not* have a principal place of business in the State of Michigan (iii) *has not* had service of process in this action (iv) *has not* filed a motion to intervene in this action and (v) *has not* been brought in this action as a third party Plaintiff or defendant.

(19) The subject-matter of said Defendants' Motion for Summary Judgment and Award of Attorney's Fees is said agreement between Plaintiff and BMI. The terms of said agreement dictates that such agreement (1) is governed pursuant to the laws of the State of New York (2) shall be submitted to arbitration, prior to litigation of any disputes "arising out of the performance thereof or based on the breach thereof" and (3)

"shall be submitted to arbitration in the City, County and State of New York".

(20) In its Order Denying Plaintiff's Motion to Reverse and/or Set Aside and/or Vacate Void Judgments, entered August 31, 1976, *the Court ruled Plaintiff's said Motion was "untimely, not having been filed within twenty (20) days after judgment; and further ordered that said motion be "denied on the merits since it presents no new issues."* On August 31, 1976 the Court also entered in this action Order Vacating Notice of Hearing of said motion. (App. A p. 1)

STATEMENT OF FACTS

I. Civil Action Nos. 39071, 39072, 39073 and 39074

1. On the 19th day October, 1972, four (4) actions were commenced by Plaintiff-Appellant, (hereinafter Plaintiff) pro se, in the United States District Court for the Eastern District of Michigan, Southern Division, entitled Fleming S. Jackson, Plaintiff, against Stone & Simons Advertising, Inc., et al., Defendants, Civil Action Nos. 39071, 39072, 39073, 39074, by the service upon petition of Summons and Complaint. Such actions are civil actions for damages only for alleged statutory infringements of copyright. The[1] Complaints in actions allege as follows:

(a) That the Defendants-Appellees (hereinafter Defendants) infringed the exclusive rights of the Plaintiff, Fleming S. Jackson, owner and proprietor of copyright to a musical composition entitled "Merry Christmas To You".

(b) That such exclusive rights are granted to owner and proprietor of copyright by 17 USC § 1. (App. VII p. 123)

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[1] The allegations in Civil Action No. 39071 are typical of the allegations in Civil Action Nos. 39072-39074. (App. S p. 35)

(c) That such exclusive rights were infringed by the Defendants due to the appropriation and reproduction of a portion of a sound recording of said work.

(d) That the Plaintiff (1) paid the entire cost of the production of such sound recording; (2) organized and (3) directed such production, which resulted in the creation of (i) a master tape (ii) written orchestration and (iii) a commercial sound recording of said work, i.e. a 45 r.p.m. plastic record, which was promoted on the air, i.e. radio, and sold to the public in legitimate places of business.

(e) That the Plaintiff has complied with the Act of July 30, 1947, and all other laws governing copyrights and secured the exclusive rights and privileges in and to copyright of said musical composition. (App. VI p. 118)

(f) That this cause arises under the United States Copyright laws, 17 USC § 101 thereof of which federal district court has original jurisdiction of such cause pursuant to 28 USC § 1338(a).

(g) That the Defendant made "unfair use" of Plaintiff's production of said work.

(h) That all of the Defendants are citizens of the State of Michigan, i.e. with the exception of defendant Joe Doe, the announcer, who was identified, during discovery, as Saul Wineman, the announcer, a citizen of the State of Michigan.

(i) That the acts of alleged infringement complained of in said Complaints were committed within the State of Michigan, County of Wayne.

(j) That the Defendants infringed Plaintiff's copyright to said work.

(k) That the Defendants used tape transcriptions of a portion of Plaintiff's production of said work as background music in a

commercial on television, which promoted defendant Meyer Jewelry Company, without license or consent of Plaintiff and for profiit.

(l) That the Defendants copied, produced, reproduced, adapted, represented, sold, manufactured, recorded, procured, authorized broadcast and broadcast tape transcriptions of a portion of Plaintiff's said copyrighted work without license or consent of Plaintiff and for profit.

2. In their[2] answers to said Complaints the Defendants (1) denied all claims of alleged infringement of copyright to said work and (2) set forth alleged affirmative defenses as follows:

(a) That the copyright alleged to have been infringed is void and invalid.

(b) That the Complaints in Civil Action Nos. 39071, 39072, 39073 and 39074 fail to state a cause of action.

(c) That the copyrighted work complained of is not original.

(d) That the federal district court lacks jurisdiction of the Complaints in said actions.

(e) That the accused commercial does not include music copyrighted by Plaintiff.

(f) That the Defendants have not infringed any copyright of Plaintiff's.

(g) That the music employed in the accused commercials is in the public domain.

(h) That "the music in the accused commercial was properly licensed and/or included with proper permission for the pur-

[2] Defendants' Answer filed in Civil Action No. 39071 is typical of such Answer filed in Civil Action Nos. 39072, 39073, 39074.

pose for which it was used, and thus, there is no infringement by Defendants."

(i) That "there having been no damage caused to or loss incurred by Plaintiff and no profits to Defendants attributable to such music, that the claim of infringement made herein and damages caused thereby are de minimis." (App. T p. 47)

3. Non-jury pre-trial conferences were held March 26, 1973, July 2, 1973 and, a final pre-trial conference, August 13, 1973 at which time (1) none of such conferences were recorded by a court reporter and (2) the only order issued by the Court was an order issued during the pre-trial conference of July 2, 1973 scheduling the final pre-trial conference of August 13, 1973. (App. RR p. 106)

4. On August 7, 1973, Defendants' Motion for Summary Judgment, Attorney's Fees and Costs was filed and noticed for hearing August 13, 1973. (App. R p. 34)

5. Said motion, in essence, asked for dismissal of said Complaints on the grounds that Plaintiff has "no standing to sue because he sold the performance rights to BMI and, two, he sold his rights to bring suit." (App. P p. 30)

6. The Defendants' said motion is based on an agreement between Plaintiff and Broadcast Music, Incorporated (hereinafter "BMI"), dated July 9, 1968. (App. KK p. 91)

7. Said agreement grants to BMI the exclusive right "to perform" and to license others "to perform" said work as a musical composition.

8. Said Defendants' motion was heard November 19, 1973, at which time the Court orally granted said motion to the Defendant television stations and the respective owners of such stations. (App. B p. 2) (App. NN p. 102) (App. OO p. 103)

9. On December 17, 1973, Plaintiff appealed from said oral grant of summary judgment in Appeal No. 74-1263, which was dismissed May 29, 1974, for lack of jurisdiction, upon a motion filed by the Defendants January 7, 1974. (App. XIII p. 139)

II. Civil Action No. 74-70900

1. On the fourteenth day of December, 1973, an action was commenced by Plaintiff, Fleming S. Jackson, through a former counsel, in the Circuit Court of the State of Michigan, in and for the County of Wayne, as Civil Action No. 73-258417-CZ, by the service upon petition of Summons and Complaint. (App. U p. 51)

2. Said action was removed to the district court on January 2, 1974.

3. No proceedings in said action were held in said Circuit Court. Said action is an action of alleged conversion of Plaintiff's personal property by the Defendants in Civil Action Nos. 39071, 39072, 39073 and 39074. Such action is, in essence, an action of alleged "unfair competition." Plaintiff alleges conversion by the Defendants of his "master tape" of said copyrighted work.

4. In their Petition for Removal, Defendants argued that removed Civil Action No. 74-70900 is "essentially identical in law and fact" to the four co-pending Complaints filed in the Federal District Court on October 19, 1972, as Civil Action Nos. 39071, 39072, 39073 and 39074. *The Court agreed with such argument.* On January 28, 1974, Plaintiff's Motion for Remand was heard and denied. (App. LL p. 100) (App. M p. 25) (App. N p. 26)

5. In their Answer to removed Civil Action No. 74-70900 the Defendants set forth the same (1) answer; and (2) affirmative defenses set forth in said Civil Action Nos. 39071 through 39074,

with the exception of jurisdiction. *The Defendants alleged "that the Circuit Court for the County of Wayne of the State of Michigan is without jurisdiction since jurisdiction over copyright action lies wholly within the Federal District Courts in accordance with the Copyright Statutes of the United States* and, second, action herein is barred under both the federal statute of limitations as applied to copyright suits and also under the statute of limitations of the State of Michigan." (App. W p. 62)

(6) A jury demand was filed with the Complaint in removed Civil Action No. 74-70900. (App. V p. 61)

(7) During a hearing held April 15, 1974, in Civil Action Nos. 39071 through 39074, the Court acknowledged that a demand for a jury trial had been filed in Civil Action No. 74-70900. (App. L p. 22 [Tr. p. 32])

(8) To their Petition for Removal, the Defendants annexed, as follows:

a) Answer to removed Civil Action No. 74-70900.

b) Motion for Consolidation of removed Civil Action No. 74-70900 with Civil Action Nos. 39071, 39072, 39073 and 39074.

c) Motion for Summary Judgment.

d) Counterclaim.

(9) The Defendants based their Motion for Summary Judgment in removed Civil Action No. 74-70900 on the same grounds set forth in Defendants' Motion for Summary Judgment filed August 7, 1973, in said Civil Action Nos. 39071 through 39074. Hence, the Defendants asked for summary judgment based on: a) the same grounds; b) the same brief; c) the same affidavits; and d) the same oral argument set forth during the hearing of said Defendants' Motion for Summary Judgment heard November 19, 1973, in Civil Action Nos. 39071, 39072, 39073 and 39074.

(10) In their MOTION FOR CONSOLIDATION, and COUNTERCLAIM annexed to said PETITION FOR REMOVAL, the Defendants alleged the same argument and affirmative defenses as set forth in their answer to said four co-pending suits, with added allegations of abuse of process and breach of contract.

(11) Under said Counterclaim the Defetndants requested: a) that the Court order Plaintiff to pay Defendants all expenses incurred by Defendants, due to removed Civil Action No 74-70900, including an award of exemplary damages for harassment and abuse of process and breach of contract; b) that the Court preliminarily and permanently enjoin Plaintiff from ever again instigating any further lawsuits against Defendants in said action relating to his alleged copyrighted music and/or copyright; and c) that the Court grant summary judgment dismissal of the Complaint in said action on the same grounds set forth in the four co-pending suits, Civil Action Nos. 39071 through 39074.

(12) A hearing of said Defendants' MOTION FOR SUMMARY JUDGMENT was held February 25, 1974, in said removed Civil Action No. 74-70900, at which time the Court orally granted said motion to the Defendant television stations and their respective owners. (App. N p. 26)

(13) The Court reserved its ruling as to the remaining Defendants in said action.

(14) The grant of summary judgment to said Defendants in said action was entered on the docket February 25, 1974.

(15) On March 26, 1974 Plaintiff filed Appeal No. 74-1490 which was dismissed, in orders filed January 23, 1975, and February 17, 1975, for lack of jurisdiction, upon Plaintiff's response to a show cause order entered in said appeal December 20, 1974, demanding that Plaintiff show cause on or before

December 31, 1974 why said appeal should not be dismissed for want of prosecution. (App. XIV p. 140)

(16) In an Opinion and Order entered April 12, 1974, from said hearings held: a) November 19, 1973, in Civil Action Nos. 39071, 39072, 39073 and 39074 of said Defendants' MOTION FOR SUMMARY JUDGMENT; and b) February 25, 1974, in Civil Action No. 74-70900 of said Defendants' MOTION FOR SUMMARY JUDGMENT, the Court granted summary judgment dismissal to Defendants WJBK-TV, Channel 2; WWJ-TV, Channel 4; WXYZ-TV, Channel 7. Storer Broadcasting Co.; The Detroit News; The Evening News Association; and WXYZ-Inc. (App. B p. 2)

(17) In said Opinion and Order entered in said actions the Court denied summary judgment to Defendants Meyer Rosenbaum; Stone & Simons Advertising, Inc.; Meyer Jewelry Company; Gary Rubin; Pioneer Recording Studio, Inc. (App. B p. 2)

(18) The Court held that: a) the said contract of license between Plaintiff and BMI constitutes a complete bar to any action against the Defendant television stations; and b) the said motion is denied the remaining Defendants in said actions because such Defendants are not protected by said contract of license nor by "custom and usage" in the trade which would make such Defendants beneficiaries of the said BMI contract.

(19) In an Opinion and Order entered April 18, 1974, from a hearing held April 15, 1974, of said motions, the Court ruled, as follows:

a) granted summary judgment to Defendant Meyer Rosenbaum bottomed solely on the affidavit of Defendant Meyer Rosenbaum; (App. L p. 22 [Tr. p. 43])

b) denied summary judgment to Defendant Meyer Jewelry Co., of which Defendant Meyer Rosenbaum is president and

principal stockholder, due to the presence of an issue of fact regarding alleged infringement within the doctrine of *Shapiro, Bernstein Co. v. H. L. Green Co.*, 316 F2d 304 (CA 2, 1963); (App. L p. 22 [Tr. pp. 43-44])

c) granted the Defendants attorney's fees and costs in removed Civil Action No. 74-70900; (App. L p. 22 [Tr. p. 31])

d) granted Defendants' motion to consolidate the Complaints in Civil Action Nos. 39071, 39072, 39073 and 39074; (App. L p. 22 [Tr. pp. 31-32])

e) that Civil Action No. 74-70900 *"will be consolidated with the other four actions for purposes of discovery only because that Complaint requests a jury trial"*; (App. L p. 22 [Tr. p. 32])

f) granted "Defendants Motion to Defer Answers to Plaintiff's Request for Admissions until after a final Judgment upon Defendants' Motion for Summary Judgment is granted"; (App. L p. 22 [Tr. p. 32])

g) denied Plaintiff's MOTION TO AMEND THE COMPLAINTS in Civil Action Nos. 39071, 39072, 39073 and 39074; the Court ruled that "Paul Winter, the announcer in the accused commercial and Tru Soul Publishing Company, which is allegedly the publisher of Plaintiff's copyrighted music, is denied because the three-year federal Statute of Limitations and the state Statute of Limitations has run;" and (App. C p. 6)

h) denied Plaintiff's MOTION FOR SUMMARY JUDGMENT because *"there are material questions of fact."* (App. C, p. 6)

(20) Plaintiff includes by reference as though fully set forth herein the following:

III. Civil Action Nos. 39071 through 39074.

(1) On April 14, 1975, the Court entered in Civil Action Nos. 39071, 39072, 39073 and 39074 its second Standing Order Re Final Pretrial Conference in Judge Kennedy's Court in Non-Jury Cases. (App. SS p. . . .)

(3) On June 9, 1975, a second final pretrial conference in Civil Action Nos. 39071, 39072, 39073 and 39074 was held, at which time said conference was recorded by the court reporter.

(4) *During said "final pretrial conference Plaintiff and Defendants' attorney of record signed, in the presence of the Court, and presented to the Court a "Stipulation of Uncontested Facts."* (App. BB p. 74)

(5) During said pretrial conference the Defendants produced several documents.

(6) The production of said documents is confirmed in Plaintiff's "Confirmation of Production of Documents" filed August 8, 1975. (App. HH p. 86)

(7) During said final pretrial conference Plaintiff filed: a) Itemized List of Special Damages; b) list of Plaintiff's Witnesses; and c) Plaintiff's Schedule of Exhibits.

(8) During said pretrial conference, the Court, at page 19 of the transcript, said as follows:

> "• • • *The issues that will be tried are the issues raised by the pleadings. The question is whether the music they played is the music copyrighted which they have not admitted. I have to try that issue.*
>
> "Then, we have—let's assume that I find that it's the music you copyrighted that they played, then, we have the issue of whether they had any right to play it which

they claim they had. *We will try to—those issues and then the question whether there is injury or damages, what music was played and what the injury and damage is.* * * *" (App. CC p. 75)

(9) The Court did not issue any orders as to what issues were to be tried, neither during nor subsequent to said final pretrial conference.

(10) During said "final" pretrial conference the Defendants filed Pre-Trial Statement of Defendants, and Summary of Defendants' Theory of the Case. (App. EE p. 79) (App. FF p. 81)

13. On June 11, 1975, the Court entered in Civil Action Nos. 39071, 39072, 39073 and 39074 its Notice of Bench Trial with trial set for September 16, 1975, at 9:00 A.M. (App. TT p. 110)

(11) On June 13, 1975, Plaintiff filed objections to Defendants' trial exhibits in Plaintiff's Objections to Trial Exhibits. (App. GG p. 83)

(12) On June 13, 1975, Plaintiff filed Summary of Plaintiff's Theory of the Case, as instructed by the Court.

(13) On July 11, 1975, a second Defendants' Motion for Summary Judgment was filed in Civil Action Nos. 39071, 39072, 39073 and 39074.

(14) On July 11, 1975, the Defendants also filed notice of evidentiary hearing regarding the amount of attorney's fees to be awarded to the Defendants under Opinion and Order entered April 18, 1974, in Civil Action Nos. 39071, 39072, 39073, 39074 and removed Civil Action No. 74-70900.

(16) On July 15, 1975, Plaintiff served on the Defendants: a) Plaintiff's Motion to Strike Defendants' Motion for Summary Judgment; b) Motion for Order to Set Aside and Vacate

Order Denying Plaintiff's Motion to Amend Complaints in Civil Action Nos. 39071, 39072, 39073, and 39074; and c) Motion for Order to Amend Complaints.

(17) On or about July 18, 1975, Defendants' Objection to Plaintiff's Motion to Strike Defendants' Motion for Summary Judgment along with Defendants' Objection to Plaintiff's Motion to Amend Complaints was filed.

(18) Plaintiff's Reply to Defendants' Objection to Plaintiff's Motion to Strike Defendants' Motion for Summary Judgment in Civil Action Nos. 39071, 39072, 39073, and 39074 was filed in the record as docket entry 144.

(19) On July 29, 1975, Plaintiff's Motion for Summary Judgment in Civil Action Nos. 39071, 39072, 39073, and 39074 was served on the Defendants' counsel of record.

(20) On July 30, 1975, Defendants' Objection to Plaintiff's Notice of Hearing for Summary Judgment and Motion to Defer Hearing was filed.

(21) On August 5, 1975, Plaintiff's Objection to Defendants' Motion to Defer Hearing was filed.

(22) In an Opinion and Order entered August 29, 1975, in Civil Action Nos. 39071, 39072, 39073 and 39074 the Court denied said Plaintiff's Motion for Summary Judgment. (App. E p. 9)

(23) Most of the time, during a hearing in said actions held August 11, 1975, at which time Plaintiff's said motion was set to be heard, was spent arguing evidentiary matters regarding the award of attorney's fees and costs to the Defendants; the balance of the time was spent arguing Defendants' Motion for Summary Judgment. Plaintiff's Motion for Summary Judgment was not heard.

(24) Pursuant to instructions from the Court's law clerk, Plaintiff noticed for hearing, Tuesday, July 29, 1975, at 2:00 P.M., the motions, as follows:

a) Plaintiff's Motion to Strike Defendants' Motion for Summary Judgment.

b) Motion for Order to Set Aside and Vacate Order Denying Plaintiff's Motion to Amend Complaints.

c) Motion for Order to Amend Complaints.

(25) Such said hearing was cancelled without notice to Plaintiff.

(26) Counsel for the Defendants was not present in the Judge's chamber, nor in the corridors outside of the courtroom, between 1:30 P.M. and 2:00 P.M., on said date.

(27) It is assumed, by Plaintiff, that the Defendants' attorneys had been informed of the cancellation of said hearing.

(28) In a Notice of Hearing filed August 1, 1975, said motions were set for hearing August 11, 1975, by the Court.

(29) During said hearing the time was spent arguing: a) evidentiary matters regarding the grant of attorney's fees for the Defendants; and b) Defendants' Motion for Summary Judgment.

(30) Though Plaintiff's said motions were denied in Opinion and Order entered August 18, 1975, and August 29, 1975, said motions were not heard. (App. D p. 8) (App. G p. 14) (App. ZZ p. 115)

(31) On August 29, 1975, the Court entered, as follows:

a) Civil Action Nos. 39071, 39072, 39073 and 39074 (Only).

1) Opinion and Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment. (App. E p. 9)

2) Judgment Dismissing Action. (App. UU p. 111)

b) Civil Action Nos. 39071, 39072, 39073, 39074 and removed Civil Action No. 74-70900.

1) Opinion and Order Granting Attorney's Fees and Costs to Defendants. (App. F p. 13)

2) Judgment for Attorney's Fees ($1,075.57). (App. VV. p. 13)

3) Opinion and Order Denying Plaintiff's Motion to Amend the Complaints. (App. G p. 14)

4) Order Denying Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment. (App. ZZ p. 115)

c) Removed Civil Action No. 74-70900 (only).

1) Opinion and Order Granting Defendants Stone & Simons' and Meyer Jewelry's Motion for Summary Judgment. (App. H p. 15)

2) On September 5, 1975, in removed Civil Action No. 74-70900 Defendants' Motion for Summary Judgment with brief was filed.

3) On September 8, 1975, the Court entered an order, pursuant to Rule IX(j), Rules of the United States District Court for the Eastern District of Michigan, directing that said Defendants' motion be submitted on briefs without oral argument on or before September 22, 1975 (App. YY p. 115)

4) On September 19, 1975, Plaintiff's Objection to Defendants' Motion for Summary Judgment in said removed Civil Action No. 74-70900 was filed.

5) On September 26, 1975, the Court entered Opinion and Order Granting Defendants' Motion for Summary Judgment in said removed Civil Action No. 74-70900 based on the argu-

ment set forth in said Defendants' motion and brief. (App. I p. 17)

6) On September 26, 1975, the Court entered Judgment Dismissing Action in said removed Civil Action No. 74-70900 based on "the reasons stated in the Opinion and Order Granting Defendants' Motion for Summary Judgment", i.e., the performance of said contract of license between Plaintiff and BMI. (App. WW p. 113)

7) On October 16, 1975, it appears that the Court *sua sponte* awarded the Defendants additional attorney's fees and costs in the amount of $1,833.57 in an Opinion and Order entered in removed Civil Action No. 74-70900 (App. J p. 19)

8) Likewise, the Court *sua sponte* on October 16, 1975, entered Judgment for Attorney's Fees and Costs in favor of the Defendants in removed Civil Action No. 74-70900 in the amount of $1,883.57 (App. XX p. 114)

(32) Thus, the total award of attorney's fees and costs to the Defendants in said actions is Two Thousand Nine Hundred Fifty-Nine Dollars and Fourteen Cents ($2,959.14).

(33) In its Opinion and Order entered April 18, 1974, in Civil Action Nos. 39071, 39072, 39073, 39074 and removed Civil Action No. 74-70900 the Court did not cite any authority for its basis of its award of attorney's fees to the Defendants other than the said contract of license between Plaintiff and BMI.

(34) During a hearing held April 15, 1974, in Civil Action Nos. 39071, 39072, 39073 and 39074, it appears from the transcript at pages 4 and 5 that Defendants based their motion for attorney's fees and costs on 17 USC § 116 which is part of the copyright statute. (App. XVII p. 144) However, ***Defendants' grant of summary judgment in said actions in Opinion and Order entered April 12, 1974; April 18, 1974; August 29,***

1975; September 26, 1975; was not based on the construction of the copyright statute. (App. B p. 2); (App. C p. 6); (App. F p. 13).

(35.) ***The Defendants have argued throughout this lawsuit that the copyright statute is "completely irrelevant".***

The judgments entered in said actions by the Court on August 29, 1975, and September 26, 1975, are bottomed on the same grounds as the said grant of summary judgment to the Defendants in said actions, i.e., the performance of said contract of license between Plaintiff and BMI.

(36.) Plaintiff appealed from said judgments entered in said actions in Appeal Nos. 75-2401, 75-2402, 75-2403, 75-2404, and 75-2489.

(37.) All of said appeals were dismissed in orders filed August 10, 1976, pursuant to Fed R App. p. 30 and 31, with the exception of Appeal No. 75-2401, which was previously dismissed for lack of jurisdiction. (App. XV p. 141).

(38.) On August 24, 1976, Plaintiff filed and noticed for hearing Monday, September 13, 1976, Plaintiff's Motion to Reverse and/or Set Aside and/or Vacate Void Judgments because it appears from the record that such said judgment entered in said actions are absolutely void, as a matter of law.

(39.) On August 31, 1976, the Court *sua sponte* entered Order Denying Plaintiff's Motion to Reverse and/or Set Aside and or Vacate Void Judgments. (App. A p. 1)

(40.) The Court ruled "that matters raised by Plaintiff's Motion were or could have been raised in the prior proceedings in this action, the instant Motion Is Denied as untimely, not having been filed within twenty (20) days after judgment was entered; and It Is Further Ordered that the Motion be, and it is, Denied on the Merits since it presents no new issues."

(41.) On August 31, 1976, the Court also entered Order Vacating Notice of Hearing of said motion at which time the Court ruled "that the motion is an untimely motion for rehearing, and that Rule IX(a), United States District Court Rules, Eastern District of Michigan, provides that there shall be no oral arguments on motions for rehearing;

"It Is Further Ordered that the motion shall be vacated." (App. III p. 116).

(42.) On September 24, 1976, Plaintiff filed Notice of Appeal from the Order Denying Plaintiff's Motion to Reverse and/or Set Aside and/or Vacate Void Judments. (App. O p. 29).

(43.) The appeal from said order was filed in the Court of Appeals for the Sixth Circuit as Case No. 76-2523.

(44.) On December 23, 1976 Plaintiff-Appellant timely filed a brief; and appendix in said appeal.

(45.) In an order entered March 3, 1977 said appeal was dismissed under Rule 9, Rules of the Sixth Circuit. (App. XVI p. 143)

(46.) Plaintiff's Petition for Rehearing was denied in an order entered March 28, 1977. (App. XII p. 138)

(47.) Notice of Appeal to the Supreme Court of the United States was filed April 25, 1977 in the United States District Court, Eastern District of Michigan. (App. Q p. 33)

(48.) It appears that (1) such appeal involves the invalidation of federal statutes, i.e. as applied to particular facts, which must be resolved on direct appeal (2) said appeal was dismissed under Rule 9, Rules of the Sixth Circuit because such court lacks jurisdiction of such appeal pursuant to 28 USC § 1291 and (3) said Notice of Appeal to the Supreme Court of the United States is timely pursuant to 28 USC § 1252; 2101.

CONCLUSION

This appeal raises issues of fundamental importance and far-reaching effect regarding (1) the constitutionality of an Act of Congress which appears to affect the public interest (2) right to a jury trial as declared by the Seventh Amendment of the Constitution of the United States of America and (3) the prescription of rules of procedure and (ii) the application federal statutes, to particular facts, which appear to invalidate such rules and/or statutes and/or Act of Congress, in whole or in part as unconstitutional. It appears that 28 USC § 2403 may be applicable. The court below has not certified to the Attorney General the fact that the constitutionality of an Act of Congress has been herein drawn in question.

Embodied in this appeal is the preservation of the right to a jury trial. The importance of the preservation of such right requires no comment. This Court and the founding fathers of this Republic have long since laid such subject to rest. Such affirmation of the importance of the preservation of such right was eloquently set forth by Justice Story writing for the Court in *Parsons v. Bedford*, 28 US (3 Pet.) 433, 7 LEd 732. Such affirmation has been echoed, in the same spirit, by the decisions of this Court in *Dairy Queen, Inc. v. Wood*, 369 US 469, 82 S Ct 894, 8 LEd2d 44 (1962); *Ettelson v. Metropolitan Insurance Company*, 317 US 188 (1942); *Ex parte Simons*, 247 US 231, 38 S Ct 497, 62 LEd 912 (1924). In *Dimick v. Schiedt*, 293 US 474, 486, this Court held as follows:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

In a legal system, adversary in nature, such as ours, it appears that the "maintenance of the jury as a fact finding body" is the

fountainhead of equality complete before the law. Likewise, it appears that it is the rule of this Court that its jurisdiction be exercised not on the basis of "who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected." *Wilkerson v. McCarthy*, 336 US 53, 71 (1948).

It appears that contained in this appeal are questions which hinge on the two provisos set forth in *Sibbach v. Wilson*, 312 US 1 (1940), i.e. (1) "the court shall not abridge, enlarge, nor modify substantive rights in the guise of regulating procedure", and (2) the preservation of a jury trial in an action at law as declared by the Seventh Amendment of the United States Constitution.

Furthermore, there are issues embodied in this appeal that appear to be constitutional issues under the Supremacy Clause such as whether or not (1) a contract between private parties can create vested right which serve to restrict and limit an exercise of a constitutional power of Congress, *Fleming v. Rhodes*, 331 US 100 (1946); and (2) a court can, by rule, extend or restrict the jurisdiction conferred by a statute. *Hudson v. Parker*, 156 US 277, 284; *Sibbach v. Wilson, supra.*

For the reasons stated, the questions presented in this appeal are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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